

## AMENDMENT AND RESPONSE UNDER 37 CFR § 1.111

Serial Number: 09/772,189

Filing Date: January 29, 2001

Title: BAG WITH ERGONOMICALLY DISPOSED HANDLE

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Dkt: 578.0001US01REMARKS

Applicant has carefully reviewed and considered the Office Action mailed on November 28, 2007, and the Advisory Action mailed June 16, 2008. Applicant respectfully requests reconsideration of the pending claims in view of the following comments. Applicant notes that this response is accompanied by an Request for Continued Examination.

By this Amendment, Applicant has canceled Claims 1, 6, 7, 10-12 and 24-25. New claims 26-29 have been added. As such, claims 26-29 are now pending in this application. No new matter has been added. Support for new claim 26 can be found in original claim 1 and throughout the specification, support for new claim 27 can be found in original claim 12. Support for new claim 28 can be found at page 5, line 8 of the specification. Support for new claim 29 can be found at page 6, lines 14-17.

§102 Rejection of the Claims

Claim 1 was rejected under 35 USC § 102(b) as being anticipated by Fougères (USPN 4,978,024). Applicant respectfully traverses this rejection.

Applicant notes that claim 1 has been canceled. However, to the extent that the Examiner would apply this reference against new claim 26, Applicant respectfully points out that “to anticipate a claim, the reference must teach every element of the claim”. See MPEP § 2131.

Claim 26 requires “a rectangular reinforcing strip coupled to an outside surface of at least one of the first and second side walls” and that the “rectangular reinforcing strip defining a second aperture aligned with the first aperture of the first and second sidewalls” and further that “at least two of the four strip edges of the rectangular reinforcing strip are both parallel and aligned with edges of the first and second side walls”.

Fougères clearly lacks this feature of claim 26. For at least this reason, Applicant respectfully requests that this rejection be withdrawn.

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*§103 Rejection of the Claims*

Claims 1, 7 and 10-12 were rejected under 35 USC § 103(a) as being unpatentable over Etesse (European Patent No. 0630822), Berthelsen (European Patent No. 0248679), and Fougères. Applicant respectfully traverses this rejection.

While not conceding the basis for this rejection, Applicant points out that claim 1, 7, and 10-12 have been canceled.

However, the extent that this same rejection would be applied to the new claims, Applicant would like to point out that a showing of secondary considerations need only be commensurate with the scope of the claims. See *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 15 USPQ2d 1525 (Fed. Cir. 1990). In this case, the scope of the claims is relatively narrow. As such, even a moderate showing of commercial success would be sufficient to support the view that the claims are not obvious over the cited prior art.

Applicant further responds to the Examiner's statement in the Advisory Action issued on June 16, 2008. Specifically, the Examiner indicated that "Applicant's extrapolation of the gross sales figures in the declaration filed 12/20/2006 to 'logically' indicate their market share is not evidence."

While it is true that attorney argument does not constitute evidence, Applicant asserts that it is proper to draw logical conclusions from the evidence presented. With this in mind, Applicant points out that paragraph 5 of the Declaration of Sheldon Sturgis states that sales of products packaged in seed bags with the claimed features increased by over 513 percent between 2002 and 2005. Paragraph 5 goes on to state that "over the same time period, the wild bird food and grass seed markets grew at a rate not significantly greater than inflation." Necessarily then, the market share of the products packaged in seed bags with the claimed features must have increased substantially. The Examiner has offered no logical basis to suppose otherwise.

This point is supported further as paragraph 7 of the Declaration of Sheldon Sturgis states that "no substantial advertising was done to promote the wild bird food and grass seed products sold by Performance Seed over the period of time from 2002 to 2005." Indeed, as clearly stated in paragraph 6 of the Declaration of Sheldon Sturgis "wild bird food and grass seed products...are commodity products" and the products sold by Performance Seed are "largely undifferentiated" from competitive products except for the bags that they are sold in. As such,

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logic dictates that the features of the seed bags are responsible for the remarkable increase in market share.

Further, market research studies can be used to support an assertion of commercial success. See *Winner International Royalty Corp. v. Wang*, 202 F.3d 1340, 53 USPQ2d 1580 (Fed. Cir. 2000). In this case, market research studies were performed which support the nexus between the claimed features and the demonstrated commercial success. The Declaration of Sheldon Sturgis documents the results of the market research studies that were commissioned by Mr. Sturgis. The conclusions from these market studies were so significant that they are worth repeating here:

“The 2003 study’s primary conclusion was that all participants felt that the claimed features made it easier to carry and pour the bagged product. The participants felt that these claimed features made a significant difference in the product’s value, and that the claimed features would be the determining factor in the purchase of bird food assuming a comparable quality bird food and a competitive price. The participants in the market research study unanimously indicated that they would purchase bird food and lawn seed in bags with the claimed features if the quality and price of the product were comparable to that of products in traditional packages.” See Sturgis Declaration at 10a.

“The 2004 study’s primary conclusion was that the claimed features set our products apart distinctly from competitive products. The participants in the study group noticed that claimed features right away and unanimously indicated that these features made it easier to carry and pour the product. Some people indicated that they would pay more for a product including the claimed features.” See Sturgis Declaration at 10b.

As such, the results of the market research studies strongly support the nexus between the dramatic commercial success and the claimed features.

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Taken together, the points presented in the Sturgis Declaration provide striking evidence of secondary considerations that are sufficient to establish the non-obviousness of the pending claims.

Claim 6 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Etesse, Berthelsen et al. and Fougères, as applied to claim 1 above, and further in view of Japanese Patent No. 3-226460 to Toshiji Shimamoto. Applicant respectfully traverses this rejection.

While not conceding the basis for this rejection, Applicant has canceled claim 6 rendering this rejection moot.

Claims 24 and 25 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Anspacher (U.S. 5,782,562) and Rantanen (U.S. 4,971,453).

While not conceding the correctness of the rejection, in the interest of advancing prosecution, Applicant has canceled claims 24 and 25, rendering this rejection moot.

#### Conclusion

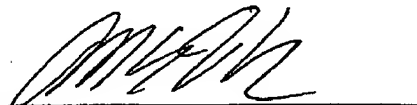
Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 50-3688.

Respectfully submitted,

Date August 25, 2008

By



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